

STATE OF MICHIGAN
COURT OF APPEALS

SCOTT BEVIS,

Plaintiff-Appellant,

v

RICHARD S. BARTHOLOMEW, D.O.,

Defendant-Appellee.

UNPUBLISHED

June 20, 2006

No. 266266

Oakland Circuit Court

LC No. 2004-056039-NH

Before: Smolenski, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendant under MCR 2.116(C)(10). We reverse and remand.

On July 4, 2001, plaintiff fell and injured his left leg. Approximately two weeks later he was examined at a hospital where he was diagnosed with a knee sprain and prescribed pain medication. On August 6, 2001, plaintiff returned to the hospital, again complaining of pain in his left leg. This time, plaintiff was diagnosed with a hairline fracture of his left femur and was referred to defendant, an orthopedic surgeon. On August 9, 2001, defendant diagnosed plaintiff with a healing occult fracture in the subtrochanteric region of his left hip and recommended that plaintiff use crutches and pain medication. On August 21, 2001, plaintiff returned to defendant, complaining of severe pain. According to defendant's records, the fracture was healing satisfactorily and plaintiff was thus again prescribed pain medication and the continued use of crutches. On August 30, 2001, plaintiff again saw defendant, complaining of occasional soreness. Defendant continued plaintiff's treatment of crutches and pain medication. On September 6 and 20, 2001, plaintiff returned to defendant complaining of pain. On September 24, 2001, defendant performed a bone biopsy of plaintiff's left femur. Based on the biopsy, defendant diagnosed plaintiff with an abscess and osteomyelitis of the left femur. According to plaintiff's expert, Dr. Gary Simon, M.D., Ph.D., when plaintiff's osteomyelitis was finally diagnosed on September 24, 2001, it had already become a chronic condition that could no longer be cured.

Plaintiff brought this suit for malpractice against defendant, alleging that defendant (1) failed to perform appropriate tests in light of plaintiff's worsening symptoms, (2) failed to consider osteomyelitis as a differential diagnosis, (3) failed to properly monitor and timely diagnose plaintiff's abscess and osteomyelitis, and (4) failed to implement treatment in a timely manner, resulting in prolonged treatment and worsening of plaintiff's condition. Defendant

moved for summary disposition under MCR 2.116(C)(10), arguing that plaintiff did not present evidence that he lost a greater than 50 percent opportunity to achieve a better result, as required by *Fulton v William Beaumont Hosp*, 253 Mich App 70; 655 NW2d 569 (2002). The trial court granted defendant's motion, reasoning that Dr. Simon's conclusion that plaintiff's chance of cure was "zero" was a "retrospective conclusion" that did not establish plaintiff's chance of cure on the date of the ultimate diagnosis "within the meaning of MCL 600.2912a and within [the] loss of opportunity doctrine."

On appeal, plaintiff asserts that contrary to the trial court's conclusion, Dr. Simon's deposition testimony was sufficient to satisfy *Fulton*. We agree. This Court reviews de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). In reviewing a decision under MCR 2.116(C)(10), we consider all documentary evidence in the light most favorable to the nonmoving party, affording all reasonable inference to the nonmovant, to determine whether there is any genuine issue of material fact that would entitle the moving party to judgment as a matter of law. *Id.* at 120.

In order to recover for loss of an opportunity to achieve a better result, a medical malpractice plaintiff must show that the alleged malpractice reduced such opportunity by more than 50 percent. MCL 600.2912(a)(2); *Fulton, supra* at 83. Here, Dr. Simon testified that plaintiff had an 80 to 90 percent chance of being cured at the time of the alleged malpractice, but that because the osteomyelitis had developed into a chronic condition by the time of its diagnosis, the disease could no longer be effectively "cured." Because the difference between an 80 or 90 percent chance of recovery and a zero percent chance of recovery is greater than 50 percent, Dr. Simon's testimony in this regard satisfies MCL 600.2912a(2), as interpreted by this Court in *Fulton*.

Defendant argues that Dr. Simon's testimony was insufficient under *Fulton* to calculate the "loss of opportunity" because Dr. Simon's testimony was a "retrospective conclusion." For this proposition, defendant relies, as he did below, on *Kuper v Metropolitan Hosp*, unpublished opinion per curiam of the Court of Appeals, issued January 27, 2005 (Docket No. 250952). The trial court apparently agreed, stating that Dr. Simon's "obvious retrospective conclusion does not establish Plaintiff's chance of cure on the later date was literally zero within the meaning of MCL 600.2912a and within [the] loss of opportunity doctrine." However, any reliance on *Kuper* to support the grant of summary disposition in the instant matter is misplaced.

In *Kuper*, the defendants allegedly failed to timely diagnose the plaintiff's decedent's bacterial endocarditis. The plaintiff's experts testified that the decedent had an initial 90 percent chance of survival, but that by the time the defendant physicians determined that surgery was necessary, the decedent's chance of survival had been reduced to 58 percent – a differential of only 32 percentage points. In an attempt to avoid the summary dismissal required by her own expert's testimony, the plaintiff argued that because her decedent died the day after his condition was diagnosed, his actual percentage chance of survival was zero. This Court, however, noting that the plaintiff's argument clearly contradicted the testimony of her own experts, rejected the plaintiff's reliance on "the benefit of hindsight" to conclude that the decedent's survival rate was in fact "zero," and affirmed the trial court's grant of summary disposition in favor of defendants for failure to meet the lost opportunity requirement of MCL 600.2912a(2). *Id.*, slip op at 2.

Here, unlike the plaintiff in *Kupers*, plaintiff did not attempt to impeach his own expert's testimony with a retrospective conclusion based on plaintiff subsequently developing chronic osteomyelitis. Rather, Dr. Simon testified that when defendant had finally performed the biopsy and had accurately diagnosed plaintiff, plaintiff's condition had already developed into a chronic condition which, in Dr. Simon's experience, cannot be effectively cured. Although Dr. Simon cited reoccurrence of the disease following treatment by defendant as support for his conclusion in this regard, when viewed in a light most favorable to plaintiff, Dr. Simon's testimony at deposition does not support that his conclusion regarding the incurable progression of the disease was dependent upon such reoccurrence, or was otherwise wholly retrospective in nature. *Maiden, supra* at 120; cf. *Kuper, supra*. Accordingly, we reverse the trial court's grant of summary disposition and remand this case for further proceedings consistent with this opinion.¹

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray

¹ We decline plaintiff's invitation to request a special conflict panel to determine whether *Fulton, supra*, was wrongly decided. Pursuant to MCR 7.215(J)(3)(a), a "[s]pecial panel may be convened to consider outcome-determinative questions only." Because we have concluded that Dr. Simon's testimony regarding the incurable nature of plaintiff's osteomyelitis does not constitute a "retrospective conclusion" and satisfies *Fulton*'s construction of § 2912a(2), the question whether *Fulton* was wrongfully decided is not an outcome determinative question in this case.